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December 29, 2011

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, DC 20554

Re: Federal-State Joint Board on Universal Service
WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135;
WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45;
WC Docket No. 03-109; WT Docket No. 10-208

Madam Secretary:

Attached to this letter for filing, MTPCS, LLC d/b/a Cellular One (“MTPCS”) submits a petition (“Petition”) to the Commission pursuant to 47 C.F.R. §1.429, to reconsider the order it released on November 18, 2011 in the above-captioned rulemaking proceedings. *See Report and Order and Further NPRM*, FCC 11-161 (November 18, 2011). In the Petition, MTPCS has included internal business information disclosing its operating costs and locations where MTPCS believes to be providing the only wireless service to Montana consumers. The Petition is appropriately marked as confidential and a redacted version of the Petition was also filed via ECFS.

MTPCS respectfully requests confidential treatment of the Petition under 47 C.F.R. § 0.459 because information contained in the Petition is competitively sensitive and its disclosure would have a negative competitive impact on MTPCS were it made publicly available. Information in the Petition is subject to protection under 47 C.F.R. §§ 0.457 and 0.459, as demonstrated below.

Information for which confidential treatment is sought

MTPCS requests that information in the Petition be treated on a confidential basis under Exemption 4 of the Freedom of Information Act. Information designated as confidential relates to MTPCS' specific capital and operating expenditures within specific periods. Other information designated as confidential provides competitive data at specific geographic locations. The enclosed Petition therefore is marked "**CONFIDENTIAL – NOT FOR PUBLIC INSPECTION.**" The redacted information ("Confidential Information") of MTPCS is competitively sensitive information that MTPCS maintains as confidential and is not normally made available to the public. Release of the Confidential Information would have a substantial negative impact on MTPCS since it would provide competitors with commercially sensitive information and potential marketplace advantages.

Commission proceeding in which the information was submitted

The Confidential Information is included in the Petition attached hereto for filing in the above-referenced proceedings. Confidential Information is marked as such and redacted in the electronic version of the Petition filed with ECFS.

Degree to which the information in question is commercial or financial, or contains a trade secret or is privileged

The Confidential Information in question is competitively sensitive information which is not normally released to the public as such release would have a substantial negative competitive impact on MTPCS.

Degree to which the information concerns a service that is subject to competition and manner in which disclosure of the information could result in substantial harm

The release of the Confidential Information contained in the Petition would cause MTPCS competitive harm by allowing its competitors to become aware of sensitive proprietary information regarding the operation of MTPCS's business at a level of detail not currently available to the public. The amount of capital and operating expenses, and specific locations where MTPCS may have a marketplace advantage, are sensitive, proprietary and could result in substantial harm if revealed to competitors.

Measures taken by MTPCS to prevent unauthorized disclosure and availability of the information to the public and extent of any previous disclosures of the information to third parties

MTPCS has treated and continues to treat the Confidential Information in the Petition as confidential and has protected it from public disclosure to parties outside of the company.

Marlene H. Dortch, Secretary

December 29, 2011

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Justification of the period during which MTPCS asserts that the material should not be available for public disclosure

MTPCS cannot determine at this time any date on which this information should not be considered confidential.

Other information MTPCS believes may be useful in assessing whether its request for confidentiality should be granted

Under applicable Commission decisions, the information in question should be withheld from public disclosure.

If you have any questions or require any additional information, please contact undersigned counsel directly.

Sincerely,



David A. LaFuria
Brooks E. Harlow
Steven M. Chernoff
Counsel for MTPCS, LLC

cc (without enclosure):

J. Foxman

J. Tanner

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

PETITION FOR RECONSIDERATION OF MTPCS, LLC

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December 29, 2011

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SUMMARY

MTPCS, LLC d/b/a Cellular One (“MTPCS”), petitions the Commission pursuant to 47 C.F.R. §1.429, to reconsider the order it released on November 18, 2011 in the above-captioned rulemaking proceedings. *See Report and Order and Further NPRM*, FCC 11-161 (November 18, 2011) (“*Report and Order*”). In its petition, MTPCS requests a limited exception from the competitive eligible telecommunications carrier’s (“CETCs”) support amount baseline calculation methodology for CETCs subject to state mandated network build-out requirements in order to provide more equitable treatment and a greater chance to recover costs of investments and service expansion pursuant to such state requirements. By way of example, without relief from the baseline formula in the *Report and Order*, MTPCS estimates that it will be hit with a ***39.25% reduction in support***¹ on July 12, 2012, ***nearly double*** the reduction that the Commission intended in the *Report and Order*.

MTPCS’ request would modify the *Report and Order* to provide for a limited exception as follows:

1. The exception would be allowed for CETCs in states that have imposed a specific network coverage requirement as a condition of CETC designation.
2. In qualifying states, the exception would allow an alternative calculation of the support baseline for CETCs if the 20% CAF phase-down commencing in July 2012 would have the effect of reducing the CETC’s support at least 25% below the capped support it would receive in 2012 absent the CAF support freeze.

¹ This reduction is compared to the amount MTPCS would have received but for reform. The greater reduction is because MTPCS has recently expanded service to thousands of new lines in higher cost areas where it had been required to meet its obligations to the Montana PSC. Therefore, MTPCS’ support would not have been static in 2012, as assumed in the *Report and Order*. Rather, it would have increased as a result of MTPCS’s prior investments.

3. For eligible CETCs, a frozen baseline calculation would be made based on (a) line counts as of September 30, 2011, and (b) CETC cap reduction factors and per line support amounts as of December 31, 2011.

4. Eligible CETCs who wish to have their baseline calculation made under the exception would file their September 30, 2011, line counts with USAC on or before March 31, 2012. For Interstate Access Support, USAC would be directed to process the IAS line counts according to the same disbursement timetable as the remaining categories of support.

The inequitable impact of the baseline established in the *Report and Order* does not appear to have been intended. Montana, as one of the least densely populated states in the nation, can ill afford the greater than expected cuts in support for CETCs that duly expanded their networks. As shown below, the Montana PSC has previously commented to the FCC that reductions in support to Montana carriers will have significant and adverse consequences for rural consumers. The correction of this inequity is simple and not costly overall. MTPCS estimates that calculating the Montana cap in the manner it requests would increase the nationwide cap by no more than \$4.2 million, or about 0.2% (two-tenths of one percent) of total high-cost support nationwide.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
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Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

PETITION FOR RECONSIDERATION OF MTPCS, LLC

INTRODUCTION

MTPCS, LLC d/b/a Cellular One (“MTPCS”), by its attorneys and pursuant to § 405(a) of the Communications act of 1934, as amended (“Act”), and § 1.429 of the Commission’s Rules, 47 C.F.R. §1.429, hereby petitions the Commission to reconsider the order it released on November 18, 2011 in the above-captioned rulemaking proceedings. *See Report and Order and Further NPRM*, FCC 11-161 (November 18, 2011) (“*Report and Order*”).² MTPCS requests a limited exception from the competitive eligible telecommunications carrier’s (“CETCs”) support

² Pursuant to Section 1.41(b) of the Rules, this Petition is filed within thirty days of the Report and Order’s publication in the Federal Register and is therefore timely.

amount baseline calculation methodology for CETCs subject to state mandated network build-out requirements who demonstrate that investments and service expansion pursuant to such requirements would not be equitably treated under the baseline formula in the *Report and Order*.

Specifically, in states with specific CETC coverage requirements,³ and for CETCs whose baselines at the start of the phase down of support in the third quarter of 2012 would result in a first-year phase down under the *Report and Order* of greater than 25%—rather than the intended 20%—of what support would have been absent the reform,⁴ the Commission should apply an alternate baseline calculation that would better reflect infrastructure investments and operating expense burdens on the CETC.⁵

Rather than calculating a frozen baseline from 2011 disbursements, MTPCS submits that a more appropriate calculation in these limited instances would use, (a) line counts *as of September 30, 2011*,⁶ and (b) CETC cap reduction factors and per-line support amounts *as of December 31, 2011*. This method more accurately reflects the status quo in Montana, as opposed to using support disbursed during 2011, which is based on lines served in previous periods, going back as far as early 2010. This alternative calculation captures recent investments and service expansion efforts by CETCs, such as MTPCS, in fulfillment of state investment

³ To MTPCS' knowledge, the change it requests would only impact CETCs in Montana, as Montana is believed to be the only state that imposed a specific coverage requirement on CETCs. GCI has requested a similar revision for Alaska in a recent ex parte filing dated in the above-referenced dockets. See Letter from John T. Nakahata, counsel for GCI, to Marlene H. Dortch, FCC (Dec. 12, 2011) at pp. 2-3. Both requests could be granted as framed, or blended relief could be developed that would address the similar problem identified in both requests at the same time.

⁴ As demonstrated below using the example of MTPCS in Montana, the reduction in support in the first quarter of the phase down can be much greater than the 20% the Commission intended where a CETC has recently added more lines and/or high cost lines and therefore *but for the reform* would have received substantially greater support in the third quarter of 2012. The baseline the Commission chose to achieve just a 20% reduction only achieves that measure where support is static, which is not the case in Montana.

⁵ As required by 47 C.F.R. §1.429(c), the particular changes requested are set forth in full and detailed in below in the Conclusion.

⁶ To be reported to USAC on or before March 30, 2012, only for states and CETCs eligible for the exception and alternate baseline.

requirements, and would provide equitable application of the new rules, which are intended to allow a reasonable opportunity to recover investments made in high-cost areas.

An alternative baseline is justified because CETCs that were required by states to expand rapidly upon ETC designation would otherwise face inequitable results under the *Report and Order*. Such CETCs undertook the required network expansion with the expectation that the addition of new customers in high-cost areas would bring future increased support to help recoup those expenditures and the significant recurring operating expenses that are inseparable from network investments in highly rural areas.

To be clear, MTPCS does not seek here a guarantee that it will recoup all of its investments. Rather, MTPCS' proposal will prevent cuts in support during the first year of the phase down that are substantially larger than the 20 percent reduction envisioned by the *Report and Order*. Because only a small portion of CETC support in Montana is exempt from the Interim Cap, MTPCS estimates this very narrow exception would increase the nationwide CETC baseline by less than \$4.2 million annually,⁷ or about 0.2% (one-tenth of one percent) of total high-cost support nationwide.

STANDING

The purposes of Section 405 of the Act are to afford the Commission both the initial opportunity to correct errors in its decision, see *Rogers Radio Communications Services v. FCC*, 593 F.2d 1225, 1229 (D.C. Cir. 1978), and a fair opportunity to pass on legal or factual arguments before they are presented to a reviewing court. See *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997).

⁷ This estimate assumes that all CETCs in Montana benefit the same, proportionately, as MTPCS would from the alternate calculation.

Having submitted comments in the proceeding that resulted in the issuance of the *Report and Order*,⁸ MTPCS has standing to seek reconsideration as a matter of right. *See, e.g.*, 47 C.F.R. § 1.429(a).

BACKGROUND

I. MTPCS Expanded its Wireless Coverage Based on Requirements of the Legacy USF⁹ Program, With the Reasonable Expectation That the Program Would Help Defray the Costs of Building and Operating the Expanded Network Required by the State.

MTPCS is a facilities-based mobile wireless carrier providing GSM and CDMA voice and data communications services over its networks of hundreds of cell sites in rural Montana, Wyoming, Texas, Oklahoma, Louisiana, and the Gulf of Mexico. MTPCS was designated as an ETC in Montana on April 15, 2008, for areas in Montana comprising the wireline telephone service areas of Qwest, Three Rivers Telephone Cooperative, and Blackfoot Telephone Cooperative.

Montana is a challenging state to serve. It is the nation's fourth largest state geographically, but just 44th in population. Montana has a population density of just 2.7 persons per square mile—less than 1/100th of the national average of 283 per square mile.¹⁰ It ranks 48th among the states in population density, which poses substantial challenges to ubiquitous wireless deployment of both voice and broadband capable networks. Average income in Montana is less than the national average, while poverty levels exceed the national average.¹¹

The areas MTPCS serves in Montana are especially sparsely populated and many of them cannot be served without USF support. Indeed, MTPCS is the only provider, or the only

⁸ *See, e.g.*, Comments of MTPCS dated August 25, 2011.

⁹ Federal Universal Service Fund or “FUSF.”

¹⁰ *See* MTPCS ex parte filing dated October 20, 2011.

¹¹ *Id.*

provider with reasonable levels of GSM coverage in many areas such as [begin confidential]
[REDACTED] [end confidential].¹²

The Montana Public Service Commission has taken a unique approach in designating CETCs to receive high cost support. In addition to the FCC's requirements, Montana requires CETCs to commit to build out their networks to cover at least 98% of the populations in their designated areas within five years of designation.¹³ This causes applicants for ETC status to assess what they can cover within five years at the time of application, and to aggressively build out networks in the relatively short construction season afforded by the weather each year.¹⁴ Pursuant to its 2008 ETC designation order, MTPCS is required to provide coverage to 98% of the population within its ETC service area by April, 2013. Since being designated, MTPCS has increased its footprint by one-third, adding 61 new cell sites, growing its network from 162 sites to 223 sites to meet its 98% population coverage requirement.

With a little over a year to go before the deadline, MTPCS is very close to completing its 98% coverage requirement, almost exclusively through substantial investments in infrastructure. These investments have resulted in a significant increase in network operating expenses, such as utilities, site rental, microwave or telco connection expenditures, property taxes, and recurring maintenance plans. As shown previously in the above-referenced dockets, MTPCS is operating dozens of cell sites at a loss, mainly as a result of low population density.¹⁵ These sites were

¹² MTPCS Comments dated April 18, 2011 at 4. This list provides examples; it is not exhaustive.

¹³ MTPCS, LLC, dba Chinook Wireless, Application for Designation as an Eligible Telecommunications Carrier, Final Order, Order No. 6812d; Docket No. D2007.2.18 (Service Date April 18, 2008); *see also* MTPCS Comments dated April 18, 2011.

¹⁴ This is especially true for small, independent carriers such as MTPCS, that have no ability to cross-subsidize or access capital markets at rates comparable to the "Big 4" carriers.

¹⁵ Many of these cell sites are located in mountainous areas and dense forests, subject to flooding, ice storms, and avalanche. MTPCS must pay cell site technicians to go to distant sites in the middle of the night without fail, even in subzero temperatures in many feet of snow – our engineers use snowmobiles, snowshoes, and more – or in flood

built pursuant to rules in effect at the time, with the expectation that transitions to new support mechanisms would not be implemented in a “flash cut” manner, so that MTPCS would have a reasonable expectation of recovering investments and operating expenses incurred pursuant to Montana’s 98% coverage requirement.

Additionally, in 2010 and 2011, MTPCS continued its good faith efforts to meet the letter and spirit of the USF program not only by advertising in remote and very rural areas, but also by visiting these areas with sales and support staff to inform these communities about the services available to them, to deliver handsets, and to answer customer questions and issues. MTPCS has made significant efforts to reach these areas, including remote Indian reservations and other underserved communities, many of which are 100 miles or further from the nearest wireless retail location¹⁶ and, consequently, the existence of a cell site would not translate into any benefit to the community without such efforts. Building on its investments in new network, and continued significant expenditures on operating expenses and extensive community outreach, MTPCS has within the last year extended service to thousands of people in remote, rural, high cost areas within its ETC footprint. As noted above, many communities, including some on tribal lands, would not have wireless service were it not for these efforts.

The incremental subscriber revenues from the new customer additions driven by Montana’s ETC build out requirements are not sufficient to enable MTPCS to cover the high cost of constructing the new rural cell sites and maintaining them going forward. In fact, [begin confidential] [REDACTED]

conditions, when safely approachable – to work on site equipment maintenance. These operating expenditures are essential to the provision of service to numerous Montanans, including residents of tribal lands.

¹⁶ For example, Browning, Montana, is approximately 129 miles from Great Falls, Montana.

¹⁷ All revenues from the plant, including SMS and 2G data, are included in this calculation.

[REDACTED]

[REDACTED]

[REDACTED] [end confidential]

Due to the low population densities in the areas MTPCS must build to fulfill its Montana ETC coverage obligations, there simply aren't enough potential new customers in the new coverage areas to recoup the costs. The revenue gap has been—*and was to be*—filled by FUSF support. Even before the *Report and Order*, this was a challenge in Montana. For example, MTPCS has approximately \$[begin confidential] [REDACTED] [end confidential] in estimated total 2011 expenses relating to its operations in its ETC areas in Montana, but receives only about \$4,000,000 per year in capped support annually for these areas.¹⁹

In sum, a substantial part of the MTPCS network in Montana was constructed to meet the 98% build out requirement on a timely basis, with the understanding that FUSF support would help to defray construction and operating costs over time. As explained below, the baseline calculation in the *Report and Order* treats CETCs in Montana unfairly by effectively eliminating support for high cost lines a CETC has added recently, based on prior network investment pursuant to state ETC requirements.

II. The *Report and Order* Results in an Unintended and Inequitable Consequence For CETCs in Montana Which Have Striven in Good Faith to Meet Their Network Expansion Obligations.

CETCs designated in Montana, such as MTPCS, who commit to cover 98% of their proposed population within five years, have had to make massive commitments of capital and

¹⁸ MTPCS has previously submitted more detailed information with a request for confidential treatment in the rulemaking below. See e.g., <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021711855>. [begin confidential]

[REDACTED] [end confidential]

¹⁹ Id.

operating expenditures to serve the rural areas of one of the most sparsely populated states in the Union. Compounding the challenges from serving low population density areas, Montana CETCs collectively start from a low baseline, receiving only about \$12 million annually, and a significant reduction of support under the current cap.²⁰ *Thus, although Montana is the 3^d most sparsely populated state, it draws less than one percent of the nationwide total.*²¹ Accordingly, the need for the full measure of the Commission's intended CETC baseline is particularly acute in Montana. The Montana PSC has repeatedly supported the concept that the state is not receiving its fair share of support nationwide, and that reductions in support to Montana CETCs will have significant and negative consequences for Montana consumers.²²

Because MTPCS took its obligations seriously and acted in good faith to meet both the letter and the spirit of the law, it invested both in network expansion and significant ongoing operating expenditures, including community outreach, in the most remote and costly portions of its ETC area, not only to achieve and maintain the 98% coverage as required, but also to ensure that service was made available to these communities, which could not be the case without extensive and sustained outreach. But it was only willing and able to make those investments

²⁰ The cap impact was due in large part to an accident of timing. MTPCS filed its application for ETC status on February 28, 2007, before the FCC opened a proceeding to cap the fund. MTPCS was granted ETC status on April 15, 2008. Two weeks *after* that, on April 29, 2008, the FCC adopted the CETC cap. However, the cap cutoff date was established in that order as an *earlier* date - March 31, 2008 - and therefore, because MTPCS had not received support in March, the amount of support deemed the cap level for Montana was not deemed to include support that would flow to MTPCS under its April designation - even though its designation date preceded the date of adoption of the cap order. The result of this was that the cap *materially and immediately reduced support* for all Montana CETCs, even though the costs of operating wireless services in this large and sparsely populated state far exceed the costs of operations in most states.

²¹ See Letter from Sharon Gillett, Chief, Wireline Comp. Bur., to Karen Majcher, USAC, WC Docket No. 05-337, DA 11-243 (Feb. 8, 2011) at Appendix A.

²² See, e.g., Montana PSC Reply Comments in the CAF NOI/NPRM, filed May 23, 2011, at p. 9 ("The wireless and wireline CETCs in Montana are providing valuable service to rural Montana. It was with that hope that the MPSC designated those companies as CETCs in the first place. Reducing or eliminating funding for those CETCs will, without doubt, have serious negative consequences for Montana rural consumers.")
<http://fjallfoss.fcc.gov/ecfs/document/view?id=7021649541>

based on a reasonable expectation that if it committed the capital, the resulting increased line counts and increased service in higher cost areas would, in turn, result in increased FUSF support. This was the case even under the interim cap, though the benefits were attenuated, because support could be increased to carriers that successfully increased their share of pre-cap support within a state. Now, for the first time, the *Report and Order* no longer compensates expansion of service and addition of lines in higher cost areas with increased support.

The impact of the Commission's significant and unexpected departure from longstanding practice of supporting CETCs based on number of lines served²³ is that carriers aggressively expanding service in higher cost areas in 2010 and 2011 receive a lower baseline going forward in 2012 than carriers with static or declining line counts, despite the fact that an increase or decrease in the number of lines served is a highly correlated indicator of the extent to which a carrier is fulfilling the fundamental intent of the Universal Service program. In this regard, the Commission's action has retroactive effect on carriers who made investments in 2008-2010 with the expectation that the rules in effect at the time would allow the opportunity to earn a return on these investments when newly captured customers were reflected in line counts filed with USAC.

The difference can be dramatic in a state like Montana, and is likely far greater than the Commission could have expected. For example, in the case of MTPCS, if support were calculated using the lines in service and support amounts as of September 30, 2011, as opposed to average 2011 support distributed, MTPCS estimates it would have received approximately \$511,000 per month in total high cost support in Montana for the third quarter of 2012 and

²³ As determined by the per line costs of the ILECs under the identical support rule.

perhaps a higher amount in the fourth quarter.²⁴ In comparison, under the Report and Order—and *before applying the 20% phase down*—MTPCS estimates that it would only be entitled to approximately \$388,000 per month in frozen high cost support. After the planned 20% phase down, MTPCS’ estimated support will be approximately \$310,000. For MTPCS, this amounts to a *39.25% reduction in support, nearly double* the reduction that the Commission intended in the *Report and Order*. Such a dramatic reduction in support contravenes the National Broadband Plan’s principle, as adopted by the Commission in its reform effort, that “flash cuts” be avoided.²⁵

Had MTPCS known in 2008, 2009, or 2010 that its support would be cut so significantly in the first year of reform, and that the cut would be more, proportionately, than other states, it could have and likely would have scaled back its investments in Montana and perhaps would have decided to not take on additional debt in 2011. Lacking that knowledge, it proceeded in accordance with the rules in good faith to meet Montana’s build requirements, it took on the increased operating expenses, and made significant efforts to reach out and attract new customers in high-cost areas.

Now, MTPCS understands that investments made based on regulatory promises may well be stranded. Keeping regulatory promises is a critical part of the regulatory compact between the government and market participants, in large part because failing to do so causes inefficiencies in

²⁴ This is a hypothetical for comparison purposes, based on MTPCS’ December 1, 2011 lines, ILEC support levels projected by USAC for the first quarter of 2012, and 12 months of FUSF support under the legacy program without reduction for the 20% phase down starting in July. Due to the approximately 10 month lag between reporting of lines and payment of support, the actual amount of support received would not have reached this level until late in 2012.

²⁵ See, e.g., Connect America Fund, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (released February 9, 2011) at p. 9 (“We do not propose any “flash cuts,” but rather suggest transitions and glide paths that we believe will facilitate adaptation to reforms. Change to USF and ICC policies need not and should not be sudden or overly disruptive....”).

the market.²⁶ Here, the baseline calculation method set forth in the *Report and Order* did not contemplate regulatory obligations in Montana which required the aggressive network and service expansion occurring in Montana and resulted in the possibility of stranded investment that MTPCS now faces. By establishing actual total year 2011 support as the baseline for capping support,²⁷ the Commission failed to capture the current status for Montana carriers who have been investing to meet a 98% build requirement and as a result, will see a much greater reduction in support in 2012.

As set forth below, a minor correction to the *Report and Order* can resolve this inequity.

ARGUMENT

I. The Commission's Adoption of 2011 Actual Support as the Baseline for CETC Support Has the Unintended Consequence of Penalizing Carriers in Montana That Were Forced to Expand Rapidly.

Without prior notice, the Commission announced in the *Report and Order* that frozen support as of January 1, 2012 would be calculated based on support provided to carriers in 2011.²⁸ The baseline calculation mechanism was detailed for the first time on November 18, 2011 in the *Report and Order*. The FCC did not include in its various NPRMs a proposed methodology for how the support freeze would be calculated. Had it done so, MTPCS would have commented and included the evidence showing specifically the anomalous and inequitable result it would produce in Montana.

By denying Montana carriers the ability to recover significant investments in capital and

²⁶ See, e.g., Making and Keeping Regulatory Promises, Warren G. Lavey, Esq., Federal Communications Law Journal, at <http://www.law.indiana.edu/fclj/pubs/v55/no1/Lavey.pdf> at pp. 48-50 (discussing difficulties the FCC experienced when implementing access charge and universal service reform, resulting in large part from an industry consensus plan that was struck without participation from all interested parties).

²⁷ There is an alternate calculation based on a \$3,000 maximum per line per year, but that alternative does not come into play for MTPCS in Montana.

²⁸ We can find nothing in the NPRM leading up to the *Report and Order* announcing that a freeze/phase down would be implemented, or the methodology to be used.

operating expenses, made as required by state law over the past two years, these changes have an unlawful retroactive effect. MTPCS made investments based on existing rules, with the understanding from the FCC that new rules would not be imposed in a “flash cut” manner so as to unfairly prejudice existing fund recipients or consumers.

Under long established rules, support has been provided to carriers based on line counts submitted well in advance. For example, high-cost loop support (“HCLS”), high-cost model support (“HCMS”), local switching support (“LSS”), and safety net additive (“SNA”) support provided in the first quarter of 2011 are based upon lines in service as of March 31, 2010. Interstate Access Support (“IAS”) paid during that period is based upon lines in service as of September 30, 2010.

For carriers such as MTPCS, who are aggressively investing in both infrastructure and operating expenses, while reaching out to rural communities, lines served in the fourth quarter of 2011 do not result in support payments until the second quarter (for IAS and ICLS) or third quarter (for HCLS) of 2012. As a result, the Commission’s decision to freeze support based upon support payments rather than lines in service severely prejudices carriers such as MTPCS who are aggressively investing in high-cost areas as required by the state.

The manner in which the FCC implemented the 20% phase down has significant implications for Montana’s CETCs. Carriers such as MTPCS, who have already made investments in reliance on the FCC’s regulatory scheme, and in furtherance of state public policy goals as embodied by the 98% coverage requirement, face an extraordinarily inequitable outcome that warrants special treatment. Based on the statements and discussion in the *Report and Order*, MTPCS does not believe this inequitable consequence was intended. As MTPCS previously noted in detailed *ex parte* presentations in the above-referenced dockets, it currently

operates numerous cell sites that do not earn enough to cover operating expenses and are dependent upon FUSF to remain in service.²⁹

First and foremost, the Commission repeatedly expressed its intention to implement gradual transitions that avoid “shocking” carriers with immediate actions that have drastic effects. *Report and Order*, ¶ 513 (“We find that a transition is desirable in order to avoid shocks to service providers...”).³⁰ Moreover, the baseline formula selected was intended to capture the *status quo ante* as the starting point for reform: “Using a full calendar year of support to set the baseline will provide *a reasonable approximation of the amount that competitive ETCs would currently expect to receive, absent reform, and a natural starting point* for the phase-down of support.” *Id.* at 515 (emphasis added).

The Commission’s clear intent as expressed in its *Report and Order* is that for the first half of 2012 there would be little or no change in CETC support from what a carrier would have received, and that future reductions would be no more than 20% per year from what CETCs would have received, but for the reform order. In the case of MTPCS, and likely other CETCs in Montana as well, this is not true. MTPCS will suffer a 39.25% reduction in support in the third quarter of 2012, compared to the 20% reduction in support that the Commission intended for the average CETC. In the fourth quarter of 2012, we estimate that MTPCS’ support will be reduced even more—by 43.48%, rather than just 20%. All other things being equal, this unfair and unintended differential will be locked in thereafter for another four and a half years.

The FCC’s unexpected denial of support for investments that have already been made

²⁹ MTPCS submitted a list of cell sites with associated data in its advocacy leading up to the *Report and Order*’s adoption. See, e.g., <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021711854>.

³⁰ See also, National Broadband Plan at Section 8.3 (“No Flash Cuts. New rules should be phased in over a reasonable time period. Policymakers must give service providers and investors time to adjust to a new regulatory regime.”), citing suggestions from carriers for transition periods of five to seven years.

violates Section 553 of the Administrative Procedures Act, 5 U.S.C. § 553, by failing to provide notice of a significant and substantive rule change, and an opportunity to comment. The effect is significant because the phase down from the level MTPCS should have received from its recent investments will be roughly *double* the intended 20% reduction, and the reduction flows directly from its compliance with Montana's CETC service expansion requirements.

In a static environment, the lag between construction, customer acquisition, and support is substantial; however, carriers have been able to plan for it and could count on support eventually catching up to the expansion. In keeping with the FCC's stated intent to transition reform in ways that do not shock carriers, using September 30, 2011, line counts and December 31, 2011, support amounts as the baseline would come much closer to the Commission's stated goal of "a reasonable approximation" of what CETCs would have received "absent reform."

Because of the standard delays built into the USAC process for reporting lines and distributing support, use of disbursements paid in 2011 as provided in the *Report and Order* means that the CETC baseline will actually be set based on lines served as far back as March of 2010. Indeed, 2011 HCLS, HCMS, LSS and SNA disbursements include no support for lines MTPCS added in after March 31, 2011. For carriers such as MTPCS, who have recently added lines based on new network investments, the frozen support baseline will be set well below the level of investment actually made as of the date on which the Commission first announced the mechanics of the program, i.e., upon publication of the *Report and Order*.

II. The Commission Should Eliminate the Inequitable and Unintended Harm to Montana CETCs by Adopting a Narrow Exception to the Baseline Calculation Formula in the *Report and Order*.

A key tenet of the Communications Act provisions on universal service is that support must be "predictable," in large part to ensure carriers are willing and able to invest, with a

reasonable chance that investments can be recovered.³¹ In the *Report and Order*, the Commission attempted to balance the requirement of predictability against the need for reform by establishing a baseline for starting reform that would give CETCs roughly the same support for the first half of 2012 as they would have received absent reform. That was to be followed by predictable annual reductions of 20% each year from what the CETC would otherwise have received, starting July 12, 2012. Unfortunately, the baseline inputs selected fail to achieve those levels of predictability for CETCs pursuing the aggressive expansion required in Montana, which appears to have been an unintended consequence of the order.

In the case of MTPCS, the company has invested over \$[begin confidential] [REDACTED] [end confidential] in areas where it is eligible for FUSF in Montana over the past year, while receiving approximately \$4 million in support. The relief requested here will not enable MTPCS to fully recover its investment, however it will be more consistent with the Commission's goals of avoiding flash cut changes and sudden transitions that shock carriers and undermine high-quality services to rural high-cost areas, and will be consistent with the investment case that MTPCS knowingly undertook.

Fortunately, the problem with the baseline formula can be easily corrected, and at a *de minimis* overall cost. Specifically, rather than calculating a frozen baseline from 2011 disbursements that were based on line counts and per line rates as of various time periods in 2010, MTPCS submits a more appropriate calculation for states such as Montana would use line counts and per line support amounts *as of September 30 and December 31, 2011*, respectively. This would eliminate most of the reporting lag, better reflecting recent extensions of service by CETCs based on the Montana 98% coverage requirement. MTPCS estimates that its proposal

³¹ See, e.g., 47 U.S.C. § 254(b)(5).

would increase support above the nationwide frozen support baseline by no more than \$4.2 million.

The exception would operate as follows. A potentially qualifying CETC would file its lines as of September 30, 2011, on or before March 31, 2012. USAC would process the line counts using per-line amounts in effect as of December 31, 2011 to achieve an uncapped support total.³² This uncapped total would then be multiplied by the statewide cap factor and nationwide IAS cap factor in effect as of the December 2011 disbursement. This monthly adjusted baseline would then be compared to the CAF baseline that would have resulted from application of the CAF high-cost support freeze, that is, the CETC's average monthly support disbursed in 2011. If the CAF baseline is at least 25% below the adjusted baseline, the CETC's adjusted baseline will be used instead of the CAF baseline. If the CETC's CAF baseline is not at least 25% below the adjusted baseline, it will receive support based on its 2011 disbursements as set forth in the *Report and Order*.

There is precedent for this type of exception in the *Report and Order* itself in two instances where the Commission recognized unique circumstances in remote parts of Alaska and for a carrier owned by the Standing Rock Sioux Tribe. *See, e.g., Report and Order* at 522. Indeed, the situation in Montana is very similar to that of the Standing Rock Sioux in that occurrences within the last year have rendered the CETC support baseline inequitable. In the case of the Standing Rock Sioux, the Commission's own action created both the opportunity and the inequity, so the Commission was aware of the need for the exception. But in the case of

³² Under the proposal described herein, USAC would be directed to process IAS lines and support on the same timetable as the remaining categories of support, instead of following the existing USAC practice involving a shorter lag between lines in service, line count reporting, and payment. Because USAC's practice is not set forth the rules, this directive would not require a waiver of Commission rules. However, should the Commission determine a waiver is needed to achieve this result, we request that the Commission grant a waiver of applicable rules the extent necessary.

Montana, the Report and Order gives no indication that the Commission was aware of the unique circumstances, and the public had no notice of how the final rule on frozen support would be implemented.

Here, MTPCS asks the Commission to reconsider how it established the baseline throughout an entire state, to avoid the “shock” it discussed in the National Broadband Plan. The relief requested here is much broader in that the entire state of Montana is prejudiced because the FCC did not take the state’s 98% construction requirement into account when it adopted the Report and Order. Reconsideration of this decision is needed for Montana to put CETCs there on the same footing as they are in other states that do not have such aggressive build out requirements.

III. This Petition is Based, in Part, on Facts That Were Not in the Record, But it is in the Public Interest to Consider the New Facts Under These Circumstances.

Pursuant to Section 1.429(b) of the Commission’s rules, 47 C.F.R. §1.429(b), a petition for reconsideration is ordinarily based on facts previously presented to the Commission. The Rule provides for exceptions, however, one or more of which apply to this Petition. The exceptions are:

(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;

(2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

(3) The Commission determines that consideration of the facts relied on is required in the public interest.

This Petition is based, in part, on facts which were previously presented to the Commission, as indicated by the citations above to MTPCS’ formal comments and ex parte

submissions. The new facts relate to the significant recent growth in line counts and expansion of lines into higher cost areas MTPCS over the last year and a half. The most recent data was unknown previously. But more important, because the Commission never announced how it intended to handle the issue of the baseline for the phase down of current CETC support, parties had no reason to expect that the current mechanism that adjusted support each quarter based in changes in line counts would be eliminated suddenly. Rather, the mechanism could have been based upon 2011 line counts – the most recent line counts filed – as reflective of the most current situation. Thus, there is a change in circumstances.

The baseline calculation mechanism, using support disbursed in 2011, was detailed for the first time on November 18, 2011, in the *Report and Order*. The FCC did not include in its various NPRMs a proposed methodology for how the support freeze would be calculated. Had it done so, MTPCS would have commented and included the evidence showing specifically the anomalous result it would have in Montana. Accordingly, should the Commission agree that the result of the baseline for CETCs in Montana is inequitable and requires an exception, then it can readily find that consideration of the new facts provided herein will serve the public interest.

CONCLUSION

For all the foregoing reasons, the Commission should reconsider and revise its *Report and Order* and Final Rules in Appendix A to provide for the limited exception as follows:

1. The exception should be allowed for CETCs in states that have imposed a specific network coverage requirement as a condition of CETC designation.
2. In qualifying states, the exception would allow an alternative calculation of the support baseline for CETCs if the 20% CAF phase-down commencing in July 2012 would have

the effect of reducing the CETC's support at least 25% below the capped support it would receive in 2012 absent the CAF support freeze.

3. For eligible CETCs, a frozen baseline calculation will be made based on (a) line counts as of September 30, 2011, and (b) CETC cap reduction factors and per line support amounts as of December 31, 2011, rather than support disbursed during 2011 per line support amounts as of December 31, 2011.

4. Eligible CETCs who wish to have their baseline calculation made under the exception should file their September 30, 2011, line counts with USAC on or before March 31, 2012. For Interstate Access Support, USAC would be directed to process the IAS line counts according to the same disbursement timetable as the remaining categories of support.

The foregoing exception is necessary to avoid inequity to CETCs that have been expanding their service pursuant to state requirements and help ensure adequate recovery of past and recent investments, as well as to ensure continued coverage of remote, rural, high cost areas in states such as Montana and can be implemented with a negligible effect on the overall CAF budget.

Respectfully submitted,



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